No. 17-21

In the Supreme Court of the United States

FANE LOZMAN,

Petitioner,

v.

THE CITY OF RIVIERA BEACH, FLORIDA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF INSTITUTE FOR JUSTICE AND CATO INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE* AND SUMMARY OF ARGUMENT

The Institute for Justice (IJ) is a nonprofit public-interest law firm that litigates in support of greater judicial protection for individual rights, including citizens' First Amendment right to speak about issues of public concern in their communities.[1]

As part of its efforts, IJ works to empower citizens affected by local government policies to become activists for change. IJ has trained thousands of these activists in person, including more than 2,400 property rights activists whose homes or businesses were threatened with blight designations or eminent domain and more than 900 entrepreneurs whose businesses were negatively impacted by regulation. IJ has also worked with more than 150 communities of property owners and entrepreneurs who sought to change local law or oppose harmful proposed projects—including, for example, a group of food truck owners in Sarasota, Florida, fighting an ordinance prohibiting food trucks from operating within 800 feet of a brick-and-mortar restaurant without the owner's consent, and homeowners in a Charlestown, Indiana, neighborhood targeted for redevelopment.

In addition to training activists in person, IJ has assisted countless others by publishing "survival guides" for entrepreneurs and opponents of eminent domain to use in organizing grassroots political cam-

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. The parties have consented to this filing.

paigns in their communities. See, *e.g.*, Inst. for Justice, *Entrepreneur's Survival Guide* (Sept. 2014), perma.cc/PFG5-BK54. These guides instruct activists on how to advocate for change in local government policies, including how to speak out at local government meetings and legislative hearings.

The Cato Institute is a nonpartisan public policy research foundation dedicated to individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies helps restore the principles of constitutional government that are the foundation of liberty. To those ends, Cato publishes books, studies, and the annual *Cato Supreme Court Review*, conducts conferences and forums, and files *amicus* briefs.

Amici have a strong interest in ensuring that courts are able to hold local governments accountable when they unlawfully arrest individuals in retaliation for exercising their First Amendment rights. The question presented here directly implicates that interest.

The court of appeals' holding that petitioner's retaliatory arrest claim was barred because the arrest was supported by probable cause was wrong and, if affirmed, will seriously erode Americans' ability to exercise their First Amendment rights. By foreclosing any judicial inquiry into the motivations behind an arrest—even where there is substantial evidence of a retaliatory motive—a probable cause bar would block a large number of meritorious retaliatory arrest claims. Moreover, by replacing the burden-shifting framework of *Mt. Healthy City School District Bd. of Education* v. *Doyle*, 429 U.S. 274 (1977), with a legal standard far more deferential to the government, the probable cause bar would encourage officials to retaliate through ar-

rests rather than by other means that would remain subject to meaningful First Amendment scrutiny.

Thus, affirming the lower court's decision would deter citizens from speaking on issues of public concern. Virtually everyone could be arrested for *some* offense, such as jaywalking or a traffic violation, if he or she fell into official disfavor, and a probable cause bar would ensure that any First Amendment claim based on such an arrest would fail. Faced with the risk of retaliatory arrest and likely deprived of any legal recourse, many citizen activists will censor themselves rather than speak out—a result that cannot be squared with the values that animate the First Amendment.

ARGUMENT

A. The question presented implicates important First Amendment values.

1. Democracy in America works when, and only when, members of the public are able to participate in every aspect of the political process. It is crucial that citizens be free not only to vote on Election Day but also to speak on issues of public concern and to express their views to their elected officials.

Citizen speech, as this Court has explained, is essential to democratic governance because it is the mechanism by which public opinion informs government action. The American system presupposes that politicians will be "cognizant of and responsive to [the] concerns" of their constituents; indeed, "[s]uch responsiveness is key to the very concept of self-governance through elected officials." *McCutcheon* v. *FEC*, 134 S. Ct. 1434, 1462 (2014). This responsiveness, in turn, depends on maintaining a culture of open and robust public discourse. See *Stromberg* v. *People of State of Cal.*, 283 U.S. 359, 369 (1931) ("The maintenance of the

opportunity for free political discussion to the end that government may be responsive to the will of the people * * *, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system."). Public debate on critical issues indicates to elected officials what their constituents expect—and by drawing the public into the political process, it fosters a spirit of civic-mindedness.

That is nowhere more true than at the local level. "[P]articipation in local government is"—and has long been—"a cornerstone of American democracy." *FERC* v. *Mississippi*, 456 U.S. 742, 789 (1982) (O'Connor, J., concurring in the judgment in part and dissenting in part). As early as the 1830s, Alexis de Tocqueville found it "[i]ncontestably true that the love and the habits of republican government in the United States were engendered in the townships and in the provincial assemblies," where citizens learned, and exercised, the "manners and customs of a free people" by deliberating over solutions to local problems. *Id.* (quoting 1 Alexis de Tocqueville, *Democracy in America* 181 (H. Reeve trans. 1961)). And what was true then is still true today: Many people's political activity remains centered on city councils, school boards, and other local bodies.

It is no surprise that citizen participation is especially called for in local government. State and local governments, as Alexander Hamilton observed, "regulat[e] all those personal interests and familiar concerns to which the sensibility of individuals is more immediately awake." The Federalist No. 17, at 107 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). Local governments decide when to invoke the power of eminent domain; they control the permissible uses of real property, through zoning laws; they regulate the terms on which businesses are permitted to operate; and much more besides. The decisions that local govern-

ments make on these issues rarely grab headlines outside of a particular community, but for the people affected by them, they are enormously consequential. Thus, it is vitally important that citizens be able to speak freely to their local government when it takes actions that may affect them.

2. Speaking one's mind to local government, however, is sometimes difficult. A person who expresses a view contrary to that of local officials may be received with indifference or outright hostility—particularly when the forces on the other side of an issue are well organized and well financed. Advocacy for change in local policies can thus be daunting for citizens unused to direct participation in the political process.

Citizen activists come from varied backgrounds and walks of life, but in general, they are people who have never been politically engaged before and who may not have a good understanding of how the political process works. They usually have become interested in local politics not for ideological reasons, but because a specific government policy is likely to impact their rights or their livelihood. They are also predominantly on the lower end of the economic ladder; many, for example, are first-generation immigrants seeking to establish small businesses,[2] or owners of modest homes who cannot afford to stay in their communities if forced from where they currently live.[3]

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[2] See *Clayton* v. *Steinagel*, 885 F. Supp. 2d 1212 (D. Utah 2012) (first generation immigrant challenging application of Utah's cosmetology licensing law to her hair braiding business).

[3] See IJ, *Eminent Domain in Disguise: Putting an End to Charlestown, Ind.'s Unconstitutional Home Inspection Scheme*, perma.cc/UJ7R-QVEN (describing IJ's opposition to attempts to oust the residents of a working-class neighborhood targeted for redevelopment).

The experiences of these would-be activists allow them to offer a vitally important perspective on the impact of local government policies on people's lives, in areas ranging from business licensing and regulation to eminent domain to education policy. They also have the strongest motivation of anyone in their communities to put in the time and effort needed to speak out on those issues and organize campaigns for or against particular measures or legislation. But given their political inexperience and economic vulnerability, these activists are particularly susceptible to being deterred from speaking if they believe that they will face repercussions for doing so.

B. Barring claims for retaliatory arrest where probable cause exists would severely chill First Amendment activity.

A categorical bar on First Amendment retaliation claims for arrests supported by probable cause would deal a serious blow to First Amendment freedoms. Under that approach, courts would be forbidden from undertaking the same kind of inquiry into the government's motives that they perform without difficulty in other First Amendment retaliation cases. Such an approach would encourage local governments to deal with dissenters through arrests, rather than other kinds of retaliation that draw meaningful First Amendment scrutiny—which, in turn, would exert a serious chill on activists' protected political speech.

1. A categorical probable-cause bar would prevent courts from identifying the true motive behind government retaliation.

Like many other constitutional doctrines, the First Amendment's protection against government retaliation for individuals' speech implicates courts in the task of determining the motivation for state action. In

some areas of law, such as economic regulation, courts are highly deferential in assessing the government's or the legislature's intent, upholding state action as long as a conceivably rational basis for the government's decision exists—a test that is satisfied in all but "rare case[s]." See, *e.g.*, *Armour* v. *City of Indianapolis, Ind.*, 132 S. Ct. 2073, 2080, 2084 (2012). But in First Amendment retaliation cases, courts take a much harder look at governmental intent.

In these cases, under the burden-shifting framework of *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274, 287 (1977), plaintiffs need only show that their protected First Amendment activity was a "motivating factor" behind government action against them in order to make out a prima facie case of retaliation. The burden then shifts to the government to show, by a preponderance of the evidence, "that it would have reached the same decision * * * even in the absence of the protected conduct." *Id.* This framework enables courts to hold government officials accountable for retaliation when they act with unlawful motives, while allowing official actions to stand when they would have been taken even absent any retaliation. And as petitioner notes, courts have applied that test in countless cases—including retaliatory-arrest cases—without difficulty. Pet. 23-25.

Under the approach favored by respondent and the court below, however, no inquiry into governmental intent ever occurs, because a retaliatory arrest claim is categorically barred as long as probable cause for the arrest existed. Pet. App. 7a-8a; see also, *e.g.*, *Dahl* v. *Holley*, 312 F.3d 1228, 1236 (11th Cir. 2002) ("Whatever the officers' motivation, * * * the existence of probable cause to arrest [the plaintiff] defeats her First Amendment claim."). The result is to insulate officials

from liability even where the circumstances of an arrest strongly indicate a retaliatory motive.

Indeed, that is precisely what happened here. Before the arrest at issue here, city council members had suggested "intimidat[ing]" petitioner and making him feel "heat" due to his opposition to the city's redevelopment plan. Pet. App. 3a. The city had also made petitioner "the target of a string of legal pressures," including attempting to evict him from the local marina (an action that a jury found was retaliation for petitioner's First Amendment activity), arresting him and removing him from a different council meeting, and much more. *Id.* at 19a-20a; see also Pet. 4. These facts make out a compelling case that petitioner's arrest was retaliation for petitioner's engagement in conduct protected by the First Amendment—yet the question of the city council's retaliatory intent became a moot one in light of the jury's finding of probable cause.

The protection afforded to First Amendment rights should not turn on the method by which the government infringes them—but that is the result of an approach that requires judges and juries to close their eyes to the improper motive behind retaliatory arrests. In circumstances like these, there is no compelling reason to preclude the trier of fact from assessing the motivation for an arrest and to hold the defendant liable if the arrest is found to have been in retaliation for First Amendment activity.

2. A categorical probable-cause bar unduly chills First Amendment activity.

Given that a probable cause bar would preclude many meritorious claims for retaliatory arrest from going forward (by precluding scrutiny of the motivation for the arrest), there can be no doubt that the bar would also severely chill First Amendment activity.

To start, this Court has often recognized that official retaliation for the exercise of First Amendment rights "offends the Constitution" by "threaten[ing] to inhibit exercise of the protected right." *Hartman* v. *Moore*, 547 U.S. 250, 256 (2006) (quoting *Crawford-El* v. *Britton*, 523 U.S. 574, 588 n.10 (1998)); see also, *e.g.*, *Perry* v. *Sinderman*, 408 U.S. 593, 597 (1972) (noting that if the government could take adverse action based on an individuals' First Amendment activity, "his exercise of those freedoms would in effect be penalized and inhibited"). Retaliation puts a person to the intolerable choice of speaking out and facing personal jeopardy on the one hand, and refraining from protected speech and advocacy on the other. Faced with that choice, all but the most courageous individuals will refrain from speaking—undermining the "uninhibited, robust, and wide-open" debate on public issues that the First Amendment protects above all else. *N.Y. Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964) (noting that public debate "may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials").

Retaliatory *arrest*, moreover, is one of the most fearsome tools for reprisal available to the government. It is often easy for the government to find a legal pretext on which to arrest someone who has become politically troublesome. Pet. 16-17. For example, the offense that was ultimately put forth as the basis for petitioner's arrest—"disturbing a lawful assembly"—requires only that a person act with reckless disregard for whether his or her conduct "impede[s] the successful functioning of the assembly." Pet. App. 61a. That vague standard could sweep up virtually anyone who speaks passionately on an issue or proposed measure at a local government meeting.

Beyond the confines of city hall, moreover, state and local statute books are filled with prohibitory statutes that residents honor principally in the breach and that might serve as bases for a retaliatory arrest. To cite just one set of examples, many typically absent-minded Floridians could be placed under arrest *every* time they drive a car, including for:

- driving over the posted speed limit (Fla. Stat. § 316.183);
- turning or changing lanes without signaling (*id.* § 316.155(1));
- parking more than 12 inches from the curb (*id.* § 316.195);
- making an U-turn in the presence of a sign prohibiting U-turns (*id.* § 316.1515);
- failing to stop in advance of "a clearly marked stop line" (*id.* § 316.123(2)(a));
- driving with a broken tail light (*id.* § 316.221(1)); or
- following another vehicle "more closely than is reasonable and prudent." *Id.* § 316.0895(1).

Laws like these are not ordinarily enforced with anything approaching regularity, but they would provide a ready basis for arresting a person targeted for official retaliation.

And once an arrest is made—even for a trivial offense—the potential consequences are serious:

> A custodial arrest exacts an obvious toll on an individual's liberty and privacy, even when the period of custody is relatively brief. The arrestee is subject to a full search of her person and confiscation of her possessions. * * * The arrestee may be detained for up to 48 hours

> without having a magistrate determine whether there in fact was probable cause for the arrest. Because people arrested for all types of violent and nonviolent offenses may be housed together awaiting such review, this detention period is potentially dangerous. And once the period of custody is over, the fact of the arrest is a permanent part of the public record.

Atwater v. *City of Lago Vista*, 532 U.S. 318, 364-65 (2001) (O'Connor, J., dissenting) (citations omitted); *id.* at 346 (majority opinion) (acknowledging that, at a minimum, custodial arrests present the opportunity for "gratuitous humiliation[]" of the arrestee). Thus, if government actions such as termination from a job or denial of a benefit chill First Amendment activity, *a fortiori* retaliatory arrests will have that effect.

Given the potency of retaliatory arrest as a means of political retribution, it is clear that a probable-cause bar will have a profound chilling effect on First Amendment activity. That is so for two reasons. First, as we have shown, by effectively precluding governmental liability for retaliatory arrest as long as probable cause is present, the bar ensures that many instances of unlawful retaliation will go unredressed. And second, by making it much harder to prove a claim for retaliatory arrest than for other retaliatory conduct, the bar encourages the government to retaliate by way of arrests, rather than other means.

The facts of this case prove the point. Had the city acted against petitioner in virtually any other way, his retaliation claim would have been evaluated under the *Mt. Healthy* standard, and he might have prevailed. But because petitioner's claim was for retaliatory *arrest*, it was doomed to failure unless he could show the absence of probable cause. In other words, the city was

better off having arrested petitioner than it would have been if it took virtually any other retaliatory action. If this Court affirms the decision below, the lesson will not be lost on other local governments seeking to silence nettlesome political activists.

The chilling effect of an increase in retaliatory arrests will be particularly felt by those who, like petitioner, might wish to speak out at city council or other local government meetings. Although public meetings provide citizens the opportunity to meet face to face with government officials and express their views, they face a heightened risk that, in the process of doing so, they will become known to officials and incur their displeasure. And if those officials elect to order the arrest of a person who speaks out, they have numerous potential bases for doing so before a meeting even concludes: during the events of this case, the city cited *three* different offenses as the grounds for petitioner's arrest at the city council meeting, including one (disturbing an assembly) that it failed to identify until during the trial, eight years later. See Pet. 8.

The prospect of this kind of reprisal will surely deter many would-be activists from speaking out on public issues. As explained above, many people concerned about local government policies are political novices who find public advocacy daunting. If they believe that officials can retaliate against them by ordering pretextual arrests, these individuals will either censor their political speech or refrain from speaking altogether—to their own detriment and to the detriment of the community that is deprived of hearing their views. The First Amendment cannot abide that result.

C. Retaliatory arrests are a greater threat to First Amendment activity than retaliatory prosecutions.

In saying all this, we are mindful that the Court, in *Hartman* v. *Moore*, 547 U.S. 250, 265-66 (2006), held that probable cause is a bar to a retaliatory prosecution claim. We agree with petitioner that extension of *Hartman*'s rule to the arrest context is unwarranted as a legal matter because *Hartman*'s logic does not apply in the context of retaliatory arrests. See Pet. Br. 36-48. But as a factual matter, too, retaliatory arrests and retaliatory prosecutions are different matters altogether—and extending *Hartman*'s rule to the retaliatory arrest context would pose a far greater threat to protected speech.

The decision whether to prosecute is a weighty one, made after multiple levels of review by multiple officials. A police officer cannot alone make the decision. Instead, a line attorney in the prosecutor's office typically coordinates with the police or other law enforcement officers before making a recommendation to his or her superior. The decision whether to prosecute then ordinarily requires the approval of one or more senior officials before an indictment is filed in the name of the state district attorney or U.S. Attorney or handed up by a grand jury. These layers of review better ensure that decisions to prosecute are thoughtful and deliberate, and not the product of whim or malice.

By contrast, the decision whether or not to arrest is typically made in the heat of the moment by a single police officer, with little to constrain his or her discretion. Indeed, as we demonstrated above (at 9-10), the grounds for probable cause necessary for a lawful arrest are hardly a safeguard against capricious or abu-

sive conduct—jaywalking, speeding, and disorderly conduct are enough.

Arrest is also an easier means of retaliation in light of the difference in the legal standards applied to arrests and prosecutions. An officer need only have probable cause to believe that a crime has been committed to arrest an individual. See, *e.g.*, *Devenpeck* v. *Alford*, 543 U.S. 146, 152 (2004). A decision to prosecute requires more: Under generally accepted principles, a prosecutor should bring criminal charges only if they are supported by probable cause *and* "admissible evidence will be sufficient to support conviction beyond a reasonable doubt." See Standards for Criminal Justice § 3-4.3(a) (ABA 2015). A retaliatory arrest thus may on its face appear lawful, even reasonable, where a retaliatory prosecution would not.

In short, affirming the lower court here has far greater potential to chill activists and political organizers than might have the Court's decision in *Hartman*. That counsels strongly against respondent's bid to extend *Hartman*'s rule to retaliatory arrests.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted.

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